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In The

Supreme Court of the United States

October Term, 1995

BENNIE FERGUSON, *et al.*,

Petitioners,

vs.

F.R. WINKLER GMBH & CO. KG,

Respondent.

Petition for Writ of Certiorari from the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to resolve whether the Court of Appeals for the D.C. Circuit violated the *Erie* Doctrine by failing to apply applicable precedent of the District of Columbia Court of Appeals regarding strict liability for a design defect.

2. Certiorari should be granted to determine whether the Court of Appeals for the D.C. Circuit utilized the wrong standard of review in failing to resolve all factual disputes in the light most favorable to the non-movant and failing to draw all reasonable inferences in a light most favorable to the non-movant.

PARTIES TO THE PROCEEDINGS

Petitioners, Bennie Ferguson and Mary Ferguson are residents of the state of Maryland. Mr. and Mrs. Ferguson were Plaintiffs in the lower court proceedings of this case and were Appellees before the United States Court of Appeals for the D.C. Circuit.

Respondent, F.R. Winkler GMBH & Co. KG, is the German parent corporation of Winkler USA, LP its wholly owned subsidiary which was dismissed in prior proceedings. F.R. Winkler GMBG & Co. KG was the defendant in the lower court proceedings of this case and was Appellant before the United States Court of Appeals for the D.C. Circuit.

There are no other parties to these proceedings.

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OPINIONS BELOW

On April 5, 1996, the United States Court of Appeals for the District of Columbia Circuit issued its opinion reversing the decision of the district court and entering judgment notwithstanding the jury's verdict in favor of respondent, F.R. Winkler GMBH & Co., KG and is reported as *Ferguson v. F.R. Winkler GMBH & Co. KG*, 79 F.3d 1221 (D. C. Cir. 1996). On May 24, 1996, the United States Court of Appeals for the D. C. Circuit denied Petitioner's petition for rehearing and suggestion of rehearing in banc.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the District of Columbia Circuit and its judgment of April 5, 1996. (Annexed hereto as Appendix B). On May 22, 1996, Petitioner's Petition for Rehearing and Suggestion of Rehearing In Banc were denied by the United States Court of Appeals for the D. C. Circuit. (Annexed hereto as Appendix A). The D. C. Circuit's April 5, 1996 opinion reversed the district court's denial of respondent's motion for judgment notwithstanding the jury's verdict and, in the alternative, for a new trial. (Order denying Winkler's Motion for Judgment as a Matter of Law annexed hereto as Appendix C). Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1) (1996).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

There are no statutes nor constitutional provisions involved.

STATEMENT OF THE CASE

Petitioner, Bennie Ferguson, had been an employee of Ottenberg Bakery located in Washington, D. C. since 1971.

During the course of his employment by Ottenberg, Mr. Ferguson had risen from the position of baker's helper to apprentice and finally to baker in approximately 1980.

Ottenberg purchased the Winkler String Line Proofer in 1975 from Winkler U.S.A., LP, a wholly owned subsidiary of Winkler GMBH & Co. KG organized under the laws of Germany (hereinafter referred to as Winkler). Winkler designs, manufactures, markets, sells and installs bakery equipment.

One such product Winkler designed for integration into bakery production lines was the Winkler String Line Proofer. The String Line Proofer was designed by Winkler to interface with other parts of the production line in operation at Ottenberg Bakery. The function of the Proofer was to receive pre-formed pieces of dough from the line and transport them to another segment of the line while allowing the dough to rest or proof, before being baked.

After delivering the String Line Proofer to Ottenberg, Winkler oversaw the installation and integration of its product into Ottenberg's production line for no less than eight months. Winkler's representative on site at Ottenberg was one of the String Line Proofer's designers, Bernard Jehle. Before turning the String Line Proofer over to Ottenberg, Mr. Jehle reportedly placed a warning at the discharge end or rear of the Proofer which read in its entirety "WARNING: Before cleaning or servicing or removing protective guards or covers, disconnect electric power to machine. While in operation, keep hands, loose clothing or loose hair away from moving parts." This was the only warning on the String Line Proofer.

Prior to Winkler's sale of the String Line Proofer to Ottenberg, Winkler changed the original design of the proofer. Initially, the Proofer was designed with steel access panels which were bolted onto the machine. After learning that

operators of various proofers were leaving these steel covers off the machine, Winkler redesigned the Proofer's covers replacing the bolts with a hook system to provide greater ease in removing and replacing the panels. It was this redesigned String Line Proofer with hooks, not bolts, which was sold and installed by Winkler at Ottenberg.

As an Ottenberg baker, Mr. Ferguson spent about one third of his time working on the Winkler String Line Proofer. The other two thirds of his time Mr. Ferguson spent working on other machines in the bakery.

As part of his job as a baker at Ottenberg, Mr. Ferguson was responsible for correcting problems that frequently arose in the String Line Proofer and greatly affected the machine's performance. One such problem was the occurrence of a condition known as a "hanger." A hanger occurs when, for a variety of reasons, dough coming into the String Line Proofer does not sit properly on the trays and "hangs" over the side of one of the many trays that carry dough through the proofer. This condition can cause dough to fall out of the trays and become wrapped around the Proofer's shaft, inhibiting the machine's performance. Another frequently occurring problem in the Proofer are "doubles." Doubles occur when dough entering the proofer sticks together with another long piece of dough. Similar to hangers, doubles can cause dough to fall out of the trays and become wrapped around the shaft of the Proofer also interrupting production.

According to Mr. Ferguson and others at Ottenberg, hangers and doubles were a common if not daily problem on the Winkler Proofer since its installation in 1975. Indeed, Mr. Jehle, one of the Proofer's designers who oversaw the installation of the Proofer at Ottenberg for several months, testified that even at the time of his departure hangers and doubles continued to occur in the Proofer.

In order to correct this persistent problem, Mr. Ferguson and other bakers at Ottenberg would customarily reach into the side of the Proofer near its discharge end and retrieve the hanger and or doubles from the Proofer's trays. Mr. Ferguson testified that he had reached up into the proofer hundreds, if not thousands, of times. If hangers and doubles are not retrieved from the machine, these dough anomalies will cause serious problems throughout the Proofer and, in fact, will cause the machine to be shut down. According to Mr. Ferguson, if the volume of hangers and doubles through the Proofer was too great, he would stop the machine and explain to his supervisor the reason that he turned off the machine. However, if there were just a few hangers or doubles, then Mr. Ferguson would simply reach in and retrieve them from the Proofer before they created a problem, as was the custom and practice among all the bakers at Ottenberg.

On September 25, 1988, Mr. Ferguson was performing his regular and customary duties as a baker on the Winkler String Line Proofer. As on each and every occasion prior to September 25, 1988 when Mr. Ferguson worked on the String Line Proofer, hangers were occurring in the Winkler machine. And, just as he and other bakers at Ottenberg had done on thousands of earlier occasions, Mr. Ferguson reached into the proofer through the side access panel, which was customarily removed by the bakers and subsequently replaced with a plexiglass door by Ottenberg, to retrieve hangers in the Winkler machine. Mr. Ferguson, who had no intention of placing his hand or body in the area of the shaft and sprocket, reached *up and away from the shaft and sprockets* to remove hangers from the proofer, when suddenly, his arm was grabbed by the unguarded chain and dragged into an exposed sprocket which chewed into his right bicep causing him a permanent and disabling injury. Since the date of the injury, Mr. Ferguson has been unable to continue his vocation as a baker and is currently employed as a parking attendant.

On September 25, 1991, Mr. Ferguson filed a claim against Winkler sounding in, among other things, strict liability for a defect in design of the String Line Proofer and loss of consortium in the United States District Court for the District of Columbia invoking the court's diversity jurisdiction. A jury trial held in the United States District Court for the District of Columbia before the Honorable John H. Pratt, resulted in a jury verdict in favor of Mr. Ferguson on the issue of strict liability and compensation in the amount of $679,173. The jury also awarded Mary Ferguson $230,000 for loss of consortium.

At the close of testimony, Winkler moved for judgment as a matter of law. That motion was denied by Judge Pratt. After the jury verdict, Winkler renewed its motion renamed as motion for judgment notwithstanding the jury's verdict and in the alternative for a new trial. After having the issues briefed, the trial court heard oral arguments on Winkler's motion on March 3, 1995. Again, the trial court denied Winkler's motion. Thus, everyone who heard *all* of the evidence in this case concluded that Mr. Ferguson had met his burden of proof in the instant case.

Winkler appealed the trial court's denial of both its Motion for Judgment as a Matter of Law, and its renewed Motion for Judgment as a Matter of Law and in the alternative for a New Trial to the United States Court of Appeals for the D.C. Circuit. After oral argument on January 17, 1996, the Court of Appeals reversed the district court and ordered judgment notwithstanding the jury's verdict in favor of Winkler on April 5, 1996. On May 22, 1996, the D. C. Circuit denied Mr. Ferguson's Petition for Rehearing and his Suggestion for Rehearing In Banc.

Petitioner, Mr. Ferguson, now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER THE COURT OF APPEALS FOR THE D.C. CIRCUIT VIOLATED THE *ERIE* DOCTRINE BY FAILING TO APPLY APPLICABLE PRECEDENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS REGARDING STRICT LIABILITY FOR A DESIGN DEFECT.

"The concept of a federal general common law lurking . . . as a 'brooding omnipresence in the sky,' was questioned for sometime before being firmly rejected in *Erie R. Co. v. Thompkins*, 82 L. Ed. 1188 (1938)." *Salve Regina College v. Russell*, 113 L. Ed. 2d 190, 194 (1991). "*Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum state, absent a federal statutory or constitutional directive to the contrary." *Id.* at 195. Following *Erie*, this Court made clear that state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law "with the aid of such light as is afforded by the materials for the decision at hand, and in accordance with applicable principles for determining state law." *Id.* [citing *Meredith v. Winter Haven*, 88 L. Ed. 9 (1943)].

As the *Erie* doctrine has been extended to the District of Columbia, the United States Court of Appeals for the D.C. Circuit sitting in diversity must apply the law of the District of Columbia Court of Appeals in resolving issues in the instant case. *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 553 (D.C. Cir. 1993). *See also, Pernell v. Southhall Realty*, 416 U.S. 363, 368 (1974), (holding "decisions of the District of Columbia Court of Appeals on matters of local law . . . will be treated by

this Court in a manner similar to the way in which we treat similar decisions of the highest court of a state on questions of state law"). Thus, the D. C. Circuit was required to utilize the law of strict liability in a design defect case as it has been developed in the District of Columbia by its highest court, the District of Columbia Court of Appeals.

Mr. Ferguson contends that the D. C. Circuit, in reaching its decision in the instant case, failed to follow relevant D. C. precedent regarding strict liability for a design defect and has misconstrued and misapplied product liability law in the District of Columbia. In short, D. C. law does not support the holding of the D. C. Circuit which declared as a matter of law that a manufacturer may cure an otherwise unreasonably dangerous design defect simply through a general warning. Should this Court grant this petition, the Court will most surely prevent forum shopping by defendants and plaintiffs between D.C. courts and their federal counterparts. Thus, this Court should grant certiorari to resolve this conflict between the D. C. Circuit and the D. C. Court of Appeals.

In *Warner Fruehauf v. Boston*, 654 A.2d 1272 (D.C. App. 1995), the District of Columbia Court of Appeals adopted strict liability in tort for a design defect. In so doing, the D. C. Court of Appeals adopted the risk-utility test for evaluating the strict liability of a manufacturer in a design defect case. *Id.* at 1276-1277. The D. C. Circuit erred in two critical respects in applying D. C. law in the instant case. *First,* the D. C. Circuit all but ignored the risk-utility balancing test announced by the *Warner Fruehauf* court in which a warning is but one consideration for the jury, and restated D.C. law to read "the critical issue in products liability cases in the District of Columbia is whether the warnings made the product safe at the time it left the manufacturer's control." Appendix at 14a. *Second*, the D. C. Circuit failed to evaluate the adequacy of the warnings in the

instant case under the standards announced by *Warner Fruehauf* and its progenitors.

A. The D. C. Circuit Erred In Failing To Apply The Risk-Utility Balancing Test In The Instant Case.

The D. C. Circuit's emphasis on a manufacturer's warnings in the strict liability for a design defect context is misplaced. In *Warner Fruehauf*, the District of Columbia Court of Appeals did not designate one consideration of the risk-utility test over another in adopting that analysis for strict liability in design defect cases. Though the *Warner Fruehauf* court did state that "under a risk-utility analysis, 'a manufacturer is entitled to defend a strict liability claim based on defective design by showing that a warning accompanied the product' . . . ;" it went on to unequivocally declare that "while the adequacy of the warning is relevant and may even tip the balance in the decision whether a product is or is not defectively designed, it is not the sole consideration." *Id.* at 1278 (quoting *Carter v. Johns-Manville*, 557 F. Supp. 1317, 1320 (E.D. Tex. 1983)).

In addition to the presence of adequate warnings, other considerations enumerated by the court in *Warner Fruehauf* included (1) the utility of the product to the user; (2) the likelihood the product will cause injury; (3) the availability of a safer substitute product that would serve the same need; (4) ability of manufacturer to eliminate dangerous character of the product with limited expense and without loss of usefulness; and (5) possibility of spreading loss by setting price of product and/or carrying liability insurance. *Warner Fruehauf*, 654 A.2d at 1277 n. 12 [citing, *O'Brien v. Muskin Corp.*, 463 A.2d 298, 304-305 (N.J. 1983)]. In adopting the risk-utility test, the D. C. Court of Appeals chiefly relies on *O'Brien* and *Ziegler v. Kawasaki Heavy Industries*, 539 A.2d 701 (Md. App. 1987).

In both *O'Brien* and *Ziegler*, the New Jersey and Maryland courts enumerated the very same factors relied upon by the D. C. Court of Appeals. These factors were first voiced by a commentator in 1965. *See* Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965); *see also*, Wade, *On the Nature of Strict Tort Liability For Products*, 44 Miss. L. R. 815, 837 (1973). In addressing the impact of warnings on the risk-utility test, he observed that the "addition of a suitable warning *may* cause an otherwise unsafe product to be characterized as duly safe . . . But a warning will not always be sufficient." Wade, *On the Nature of Strict Tort Liability For Products*, 44 Miss. L. R. at 842. [emphases added]. Professor Wade's influence on the New Jersey court in *O'Brien* was clear when that court pronounced that "the risk side of the equation may involve, *among other factors*, risks that the manufacturer knew or should have known would be posed by the product, as well as the adequacy of any warnings." *O'Brien*, 463 A.2d at 305 [emphasis added]. This perfectly coincides with the view of the D. C. Court of Appeals that warnings are but one factor to be considered in a design defect case.

The wording and general adequacy of the product's warning is to be judged relative to other aspects of the products design. More aptly stated, "risk-utility [analysis] is not a petrified, but dynamic process. Whether a particular product falls on the risk-utility continuum will depend on the facts of each case . . . risk-utility analysis provides the flexibility necessary for an appropriate adjustment of the interests of the manufacturers, consumers and the public." *Id.* Similarly, *Ziegler* professed that "the risk utility test is the only appropriate test to be applied in the instant case because it allows 'full consideration of the *relative merits* of a product design'." *Ziegler*, 539 A.2d at 706 [citing E.S. Diggs & T.J. Billmyre, *Product Liability in Maryland: Traditional and Emerging Theories of Recovery and Defense*, 16 University of Balt. L. Rev. 1, 16 (1986)] [emphasis added].

Drawing on both *O'Brien* and *Ziegler*, the *Warner Fruehauf* court explained that in applying risk-utility balancing the risk side of the equation may be comprised of the danger posed by the product's defective design, "less the extent to which that danger might have been reduced by" a warning. *Warner Fruehauf*, 654 A.2d at 1277. While the utility side of the equation could consist of "commercially feasible design alternatives." *Id.*

Clearly, through the direct, unambiguous language of the D. C. Court of Appeals and in its reliance on the criteria acknowledged in *O'Brien* and *Ziegler*, warnings are but one aspect of the balancing test to be applied by the trier of fact in a design defect case. The aforementioned criteria set forth a list of criteria which *must* be considered when evaluating a products design under a risk-utility analysis.

The D. C. Circuit has carved out a rule in strict liability for design defects which was never voiced by the District of Columbia's highest court and is flatly contradicted by the plain language of *Warner Fruehauf*. Though it is true that the D. C. Court of Appeals acknowledged a conflict amongst the states in their treatment of warnings in a risk-utility analysis in a variety of factual settings, it did so only after clearly announcing its opinion that warnings were but one part of a risk-utility analysis. *Warner Fruehauf*, 654 A.2d at 1278 n. 16. As explained more fully in *O'Brien* and *Ziegler*, if one is going to examine a product's design, one *must* look at the danger created by the design, available design alternatives, cost of those alternatives and the degree, if any, to which a warning goes to eliminate or limit that danger. It is purely a question of balancing the various factors of the risk- utility test.

The instant case was not a failure to warn case, but a design defect case. As such, the adequacy of the warning supplied by Winkler was *but one part of the risk-utility* analysis

appropriately within the fact-finding province of the jury. *See generally, O'Brien*, 463 A.2d at 306 (citing with approval Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L. R. at 838). In the District of Columbia, it is well established that "in cases in which there is a serious risk of injury, the adequacy of even a relatively clear warning *should not be determined as a matter of law* but is a *question of fact* for the jury." *Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712, 723 (D.C. App. 1985) [citing *Amsterdam*, 366 A.2d 1079 (D.C. 1976) [emphasis added]. During its deliberations, the jury in the instant case weighed all the factors in conducting its risk-utility balancing and determined that the risk of injury, the cost of designing a safer product, availability of an alternative design and the adequacy of the warning in the instant case all indicated that the proofer as designed by Winkler *was unreasonably dangerous.*

In *Ferguson*, the D. C. Circuit professed to simply predict the direction the law in the District of Columbia would take if the D. C. Court of Appeals were to decide the instant case in citing to Maryland precedent, which is often an indicator of the D. C. trend. However, the D. C. Circuit's reliance on *Simpson v. Standard Container Co.*, 527 A.2d 1337, 1341 (Md. App. 1987) is misplaced. While *Simpson*, a Maryland case, does state that a seller may cure an unreasonably dangerous product through warnings; it is important to note that *Simpson* was decided before the Maryland Court of Appeals undertook the issue of strict liability for a design defect. When it finally did one year later in *Ziegler v. Kawasaki Heavy Industries*, a case relied upon by the D. C. Court of Appeals in *Warner Fruehauf*, and then again in *Klein v. Sears, Roebuck and Co.*, 608 A.2d 1276 (Md. App. 1991), the Maryland court adopted the risk-utility test over the consumer expectations test to determine whether a given product design was or was not defective. As noted above, the Maryland Court of Special Appeals in *Ziegler* and *Klein* adopted the very same criteria and balancing test set out by the District of Columbia Court of Appeals in *Warner Fruehauf.*

Remarkably, in *Klein*, a case similar in many respects to the instant case, the Maryland Court of Special Appeals specifically distinguished that case from *Simpson* and its austere holding, relying instead on *Ziegler*. In *Klein*, plaintiff sought to recover in strict liability for injuries sustained from a power saw which plaintiff alleged was unreasonably dangerous by virtue of its defective design. The defendant in *Klein* contended that the tool was accompanied by abundant warnings which under *Simpson* cured its design defect. The *Klein* court observed, however, that the defendant's reliance on *Simpson* was misplaced because in *Klein* there was an issue of material fact regarding the sufficiency of the saw's warnings which should have gone to the jury as part of its risk-utility analysis. *Klein*, 608 A.2d at 1282. The *Klein* court held that the lack of specificity in the warnings and dispute as to the adequacy of the warnings made it possible for reasonable minds to differ as to "whether the existence of such a warning, if heeded, would make the saw safe for its intended use." *Id.* at 1282-1283. Thus, the adequacy of the warning is just another factor to be weighed by the jury in applying its risk-utility analysis to the product's design. As such, Maryland law lends *no* support to the D. C. Circuit's prognostication and, in fact, echoes the sentiments of the *Warner Fruehauf* court when it declared that "the adequacy of the warning is . . . not the sole consideration." *Warner Fruehauf*, 654 A.2d at 1278 (quoting *Carter*, 557 F. Supp. at 1320).

Clearly, Maryland's rejection of the consumer expectation test in *Ziegler* and *Klein*, its endorsement of the risk-utility analysis, and its embracing all of the factors discussed above, brilliantly illuminate the direction of Maryland, just as starkly as *Warner Fruehauf*'s reliance on *Carter*, *O'Brien* and *Ziegler* makes plain the trend in the D. C. Court of Appeals. That direction is one toward careful case by case, or warning by warning - product by product analysis of each and every consideration that gives rise to a product designs' safety. While

such an analysis would of necessity include a careful review of the adequacy of the product's warning, it would not do so to the exclusion of each and every other factor described above. Therefore, if the courts in Maryland are to be the true indicator of a trend in the courts in the District of Columbia then all indications clearly point to a trend toward a careful balancing of each and every element of a product's design.

Moreover, the D. C. Circuit points to *Warner Fruehauf*'s citation of § 402A of the Restatement *Second* of Torts, and finds that Maryland and D. C. law supports its contention that the D. C. Court of Appeals will adopt comment j to § 402A which states that an unreasonably dangerous product accompanied by a warning is cured of its defect. Appendix at 13a. At no point has the District of Columbia ever adopted comment j to the § 402A of the Restatement. The D. C. Circuit's prediction ignores much of the precedent relied upon by the D. C. Court of Appeals in reaching its decision in *Warner Fruehauf*. As discussed above, the D. C. Circuit ignored the *Warner Fruehauf* court's reliance on *Carter*, *Ziegler* and *O'Brien*, the latter two of which heavily relied on the writings of Professor Wade in this area. Additionally, the D. C. Circuit failed to note that the D. C. Court of Appeals adopted the risk-utility test set out in American Law of Products Liability at § 28:11-15. Section 28:15 states in part

> the trier of fact need only reasonably conclude, after balancing factors relevant in each particular case, that ... its risks outweighed its benefits, and as such the product should not have been marketed as designed. In this regard, the risk side of the equation may involve, *among other factors,* risks that the manufacturer knew or should have known would be posed by the product as well as the adequacy of any warnings.

Am. Law Prod. Liab. §28:15 [citing, *inter alia, O'Brien*, 463 A.2d 298] [emphasis added]. In keeping with all the aforementioned precedent relied upon in *Warner Fruehauf*, the District of Columbia Court of Appeals clearly stated "[a] warning is only one of a product's many design attributes that weigh in the balance of dangers against utility to determine whether a product is unreasonably dangerous." *Warner Fruehauf*, 654 A.2d at 1278 (citing *Carter*, 557 F. Supp. at 1320).

As such, the D. C. Circuit failed to apply principles set forth by this Court in *Erie* and its progeny. Therefore, Petitioner respectfully requests that this Court grant his petition to resolve this conflict between the D. C. Circuit Court of Appeals and the District of Columbia.

B. The D. C. Circuit Erred In Failing To Evaluate The Adequacy Of Winkler's Warnings Under D. C. Law.

In determining the adequacy of a warning in strict liability for a product defect, the D. C. Court of Appeals held that one must consider the location of the warning, whether the warning as stated conveys to the reader the precise nature of the defect *and* whether the warning as stated conveys to the user the precise nature of the danger arising from the defect. *Warner Fruehauf*, 654 A.2d at 1275. Generally, in the District of Columbia the adequacy of a warning should not be decided as a matter of law, but is a question of fact for the jury. *Payne*, 486 A.2d at 723.

In *Warner Fruehauf*, the D.C. Court of Appeals adopted the analysis it utilized in evaluating the adequacy of warnings in failure to warn cases for design defect cases. There can be no question that utilizing D. C. law the D. C. Circuit should have asked the following question: *did Winkler's warning warn of the specific danger caused by the precise design defect in the Proofer which injured Mr. Ferguson?* Based on its decision in

Ferguson, it is clear that the D. C. Circuit did not. No reading of the warning alleged to have been on the machine by Winkler or the Ottenberg's operation manual explicitly identify the defect in the discharge end of the proofer, (*i.e.* the lack of adequate guarding or an interlocking device) or the danger arising therefrom.

In fact, the D. C. Circuit has adopted a rationale regarding the adequacy of warnings which the D. C. Court of Appeals specifically rejected. In *Warner Fruehauf*, the plaintiff was injured when a lift gate manufactured by defendant on the back of a Pepco truck failed and crashed down on plaintiff seriously injuring him. In its decision the D. C. Court of Appeals analyzed two warnings which were in evidence. There the court held both warning decals inadequate as a matter of law. As to one of the warnings, there was no evidence that the plaintiff *saw* the decal and the other, the court held, contained only a "vague" warning of general dangers associated with lift gates. *Warner Fruehauf*, 654 A.2d at 1278. Thus, the court held that both decals failed to warn of the precise danger arising from the specific defect. The facts in the instant case are remarkably similar.

Rejecting the guidance provided by *Warner Fruehauf*, the D. C. Circuit has deemed adequate a vague admonition, present in the Ottenberg's manual, which cautions workers not to reach into moving machinery. However, such a "warning" is no more than a general warning of the dangers associated with any piece of moving equipment and, just as in *Warner Fruehauf* where a general warning of the dangers of lift gates was held inadequate, despite the plaintiff's 22 years of experience in working with lift gates, Winkler's general vague notice to users of its Proofer to avoid reaching into moving equipment is inadequate.

Further, in *East Penn Mfg. Co. v. Pineda*, 578 A.2d 1113, 1119 (D.C. App. 1990), a strict liability for failure to warn case,

the D. C. Court of Appeals held that a warning on a battery was inadequate to warn someone of considerable experience and expertise of the precise dangers which arose from the specific defects in the battery. Specifically, despite plaintiff's age and experience the court held "[a]ll this told, this testimony fails to prove as a matter of law that Pineda had nothing to learn from a properly detailed warning." *Id.*

In the instant case, the jury heard abundant evidence of significant probative value as to safer design alternatives such as inexpensive microswitches which automatically shut-off the machine when a panel is removed or opened, and inexpensive guarding to shield exposed sprockets and chains in the Proofer which were available to Winkler at the time of the Proofer's sale to Ottenberg; evidence regarding Mr. Ferguson's experience as a baker; evidence that the Proofer's designer was present at Ottenberg for eight months, a period when dough problems and corrective measures taken by bakers were occurring; and evidence of Winkler's "warnings" regarding the Proofer. After evaluating *all* of the evidence the jury unanimously concluded that Winkler's proofer was, in fact, defectively designed and the proximate cause of Mr. Ferguson's injury. In the instant case, the D. C. Circuit rejected the precedent of the D. C. Court of Appeals and failed to inquire whether or not the warning proffered by Winkler warned of the specific danger which arose from the precise defect in the machine which caused Mr. Ferguson's injury.

Like the defendant in *Warner Fruehauf*, Winkler's warnings were insufficient as a matter of law in the District of Columbia because they failed to warn the user of the specific defect in the proofer. The only item in evidence sharing any resemblance with a proper warning was a decal located on the discharge end of the proofer. This warning is inadequate under D. C. law for two reasons. First, the location of the decal was on the discharge end

of the proofer an area not visible to the user. In order for a warning to be adequate it must be somewhere the user might see it. The jury in the instant case heard testimony that Mr. Ferguson and other bakers did not stand at the discharge end of the proofer but walked up and down the line on the side of the proofer while the machine was running. Second, the warning admonishes people to avoid areas with moving parts inside the machine while it is running. A significant factual dispute arose surrounding Mr. Ferguson's conduct in the proofer on the day of his injury. After hearing all the evidence, the jury unanimously concluded that Mr. Ferguson *reached up and away* from the dangerously unguarded sprockets and gears at the bottom of the proofer, an area Mr. Ferguson never intended to encounter, inside the panel where he reached. Thus, the warning was ineffective because it was not in a location where Mr. Ferguson was likely to see it and, even if it was, it did not warn of the specific danger arising from the precise defect which caused Mr. Ferguson severe injury. Clearly under *Warner Fruehauf*, this warning is insufficient to impart knowledge of the specific defect to Mr. Ferguson and is therefore inadequate to avoid liability under a risk-utility analysis.

Moreover, the D. C. Circuit considered other texts received into evidence as adequate warnings in the instant case. Appendix at 14a. Both the language buried in Winkler's Operations and Parts Manual and the language contained in Ottenberg's Plant Safety Rules utterly fail a *Warner Fruehauf* analysis for adequacy of warnings. While stating that Winkler was entitled to rely on Ottenberg to pass on to its employees warnings contained in its users manual, the D. C. Circuit failed to apply any type of scrutiny or analysis to that warning which is mandated under D. C. law. *See Warner Fruehauf*, 654 A.2d at 1274; *East Penn. Mfg. Co.*, 578 A.2d at 1122; and *Payne*, 486 A.2d at 723. If the D. C. Circuit had applied the appropriate analysis, it would have discovered, as did the jury and the district court before it, that

Winkler's so-called warnings were wholly and remarkably inadequate.

The language in Winkler's Manual is addressed solely to the cleaning and maintenance of the machine, activities in which Mr. Ferguson was not engaged at the time of his accident. Thus, the Court's assertion that Winkler was entitled to rely on Ottenberg to pass on the warning is without merit because Winkler would have been "passing on" an inadequate warning. Furthermore, neither the language in the Winkler Manual or the Ottenberg's Safety Rules was calculated to warn the operators of the proofer of any danger from specific defects in the proofer's design. It bears repeating that under D.C. law an adequate warning should have warned Mr. Ferguson that unguarded chains and sprockets existed in the machine which could cause him serious injury.

The D. C. Circuit's assertions that Winkler had repeatedly warned Mr. Ferguson of the dangers in the Proofer are unsupported by the record and the law in the District of Columbia. Thus, Petitioner respectfully requests that this Court grant his petition to resolve the significant discrepancies between D. C. law and the findings of the D. C. Circuit Court of Appeals.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEALS FOR THE D.C. CIRCUIT UTILIZED THE WRONG STANDARD OF REVIEW IN FAILING TO RESOLVE ALL FACTUAL DISPUTES IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT AND FAILING TO DRAW ALL REASONABLE INFERENCES IN A LIGHT MOST FAVORABLE TO THE NON-MOVANT.

In reviewing the trial court's decision on a motion for judgment as a matter of law, or a motion for judgment notwithstanding the jury's verdict, the court of appeals will review the evidence *de novo* to determine whether the prevailing party proffered sufficient evidence upon which the jury could base its verdict. *Bennett Enterprise, Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 497 (D.C. Cir. 1995). "The Court of Appeals like the trial court must view the evidence in the light most favorable to the prevailing party, and the jury's verdict must stand unless the evidence, together with all inferences that can reasonably be drawn therefrom, is so one sided that reasonable people could not disagree on the verdict." *Id.* [citing, *Mackey v. United States*, 8 F.3d 826, 829 (D.C. Cir. 1993)]. Importantly, however, the *Mackey* court goes on to state that not only must the court of appeals view the evidence in a light most favorable to the prevailing party and resolve all conflicts in favor of same, but "it must not substitute its judgment for that of the jury and cannot assess witnesses credibility or weigh the evidence." *Mackey*, 8 F.3d at 829. Clearly, *Mackey* respectfully points out proper deference to a jury, the trier of fact, which has heard a case from start to finish.

The D. C. Circuit merely paid lip service to the well established principles announced in *Bennett*, *Mackey* and many

others. Thus, Mr. Ferguson takes issue with the revisionist zeal with which the D. C. Circuit rewrote the facts in the instant case. It cannot be overstated to this Court that each and every factual aspect of this case was hotly contested by both Mr. Ferguson and Winkler. In the D. C. Circuit's opinion, the court resolved each material factual dispute, of which there were many, in favor of Winkler, who had the burden of demonstrating that no reasonable person could have rendered the decision of the jury in the instant case. For example, the Court's opinion notes that "[o]n both older and newer designs [of the proofer], Winkler included the same safety mechanism: an emergency shut off button that, when pressed, would stop the line." Appendix at 6a. It was undisputed at trial that the emergency shut-off button to which the court refers was absolutely useless to Mr. Ferguson on the day of his accident as both Mr. Ferguson and Mr. Jehle, the aforementioned designer of the Proofer, agreed that he could not have reached the emergency shut-off button from the position on the Proofer where he was injured.

Had the D. C. Circuit resolved all evidentiary disputes in favor of Mr. Ferguson, the D. C. Circuit could not possibly have reached the conclusions espoused in its decision. The opinion of the D. C. Circuit is replete with errors of fact which there can be no doubt are the result of applying the wrong standard to its inquiry. The decision of the D. C. Circuit makes plain that the court erred in failing to view the evidence in a light most favorable to Mr. Ferguson, failing to draw reasonable inferences in his favor, and failing to resolve all factual disputes in his favor. Below are but a few examples of the D. C. Circuit's errant rendition of material facts in the instant case.

In the D.C. Circuit's opinion, the court states that "Ottenberg grew frustrated with the *occasional* "double". . . and hanger." Appendix at 6a. [emphases added]. This statement ignores the abundant evidence of Mssrs. Mobley, Heath, Van

Vugt and Ferguson who testified that hangers and doubles were a *constant, daily* problem on the Proofer. According to Mr. Ferguson and others at Ottenberg, hangers and doubles were frequent events on the Winkler proofer since its installation in 1975 when bakers first began to remove these dough anomalies by hand through the panel at the discharge end of the proofer.

It is undisputed that Mr. Jehle, Winkler's employee, was present at Ottenberg for up to eight months overseeing the installation of the Proofer. This undisputed fact is contrary to the D. C. Circuit's assertion that "Ferguson has not shown significantly probative evidence that the design of the proofer contemplated workers reaching into the moving machinery as part of its normal operations." Appendix at 11a. The only reasonable inference to be drawn from Mr. Jehle's presence at Ottenberg for up to eight months and the testimony of Ottenberg's workers that hangers and doubles were persistent problems from the date of the Proofer's installation, is that not only was it foreseeable that workers, such as Mr. Ferguson, would reach into the machine, but that Winkler *knew this was the practice which bakers needed to employ* to maintain normal operation of the Proofer.

Similarly, this evidence contradicts the D. C. Circuit's assertion that "Ferguson also has not shown significantly probative evidence that Winkler should have reasonably foreseen either that workers would remove the panel or that some employer, like Ottenberg, would permanently remove the panel in order to encourage workers to reach into the proofer." Appendix at 12a. Winkler had not yet released control of its product when these problems and solutions employed by Ottenberg were occurring. It is preposterous to suggest that Mr. Jehle's presence during the early portion of the Proofer's operation did not impart on Winkler the foreseeability necessary to support the jury's inference in this regard. All reasonable

inferences drawn in favor of Mr. Ferguson demonstrate that Winkler *knew* and *had actual knowledge* of the bakers' practice and custom before they left Ottenberg *and before it left Winkler's control.* The only possible explanation for the D. C. Circuit's failure to draw this inference is that the D. C. Circuit failed to apply the appropriate standard in its review of this case and improperly invaded the province of the jury.

In *Ferguson*, the D. C. Circuit also asserted that "[e]ven the presence of doubles or hangers would not demand working with the dough in the moving proofer, as neither posed an immediate threat to the continued operation of the proofer." Appendix at 11a. Mr. Ferguson's testimony and that of others revealed that *if these hangers and doubles were not removed from the proofer they would wrap around the shaft and cause the machine to stop.* If there was a dispute amongst the witnesses at trial, which there certainly was, as to the frequency of these dough problems or their impact on the Proofer's ability to function, then the D. C. Circuit should have resolved such disputes in Mr. Ferguson's favor. It did not. According to Mr. Ferguson, if the volume of hangers through the proofer was great, he would stop the machine in order to prevent the dough from becoming wrapped around the Proofer's shaft. Similarly, Mr. Ferguson and others testified that they manually removed dough anomalies from the proofer because if they did not the dough would gum up the works and cause the machine to be shut down. It cannot be argued that such a problem would not have posed a threat to the continued operation of the Proofer.

Another instance where the D.C. Circuit improperly invaded the province of the jury and failed to resolve any question in favor of Mr. Ferguson involved the existence or non-existence of a tool with which bakers would remove dough from the shaft. At trial a factual dispute arose as to the existence of a tool to remove dough anomalies from the proofer rather than the

manual method testified to by all the bakers at Ottenberg. Mr. Ferguson testified that the tool referred to above is utilized to clean the shaft of dough that has become wrapped around it when the machine is stopped. The tool was not utilized by Ottenberg's bakers to remove hangers and doubles from the Winkler machine. The record vividly demonstrated that the custom and practice of all the bakers at Ottenberg was to manually reach into the machine and remove the hangers and doubles. This directly contradicts the D. C. Circuit's assertion that "this door permitted workers to reach into the interior of the proofer and salvage hangers or separate doubles, either by hand or by use of a long rod designed for these purposes." Appendix at 6a. The long rod discussed by the D. C. Circuit was hotly contested at trial and any such contest should have been resolved by the court in Mr. Ferguson's favor.

Also in this statement the *Ferguson* court implies that prior to the addition of the plexiglass doors by Ottenberg, workers did not reach into the machine while it was running to remove dough anomalies. This is unsupported by the record which indicated that workers removed the steel access panel, which was later replaced by Ottenberg with a plexiglass door, to get at the dough anomalies that persisted in the Proofer. In fact, there is evidence which shows that this practice was in use while Winkler's representative was present at Ottenberg. *See discussion, supra* at 20-21.

As the above examples reveal, the D. C. Circuit has improperly abused its discretion and invaded the province of the jury on material questions of fact vital to the instant case. Thus, Petitioner requests this Court grant his petition to resolve the problems created in the D. C. Circuit's refusal to give due deference to the jury's findings of fact.

CONCLUSION

In the spirit of federalism that defines and exemplifies the deference to state law by federal courts sitting in diversity, this Court, as the highest Court in the land, should grant this Petition for a Writ of Certiorari to reaffirm the mandate first expressed in *Erie* that federal courts sitting pursuant to their diversity jurisdiction respectfully, carefully and thoughtfully apply the law of the appropriate state developed painstakingly over many years by the state's highest court. Recognizing the importance of uniformity in decision and to discourage forum shopping among state and federal courts, this Court has steadfastly applied the *Erie* doctrine requiring federal courts sitting in diversity to apply unwaveringly applicable state law. Petitioner seeks a writ of certiorari and the opportunity to redress the errors of the D. C. Circuit in the instant case. Every now and again, it is necessary for this Court to remind us that there is indeed no federal common law.

Respectfully submitted,

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APPENDIX A — ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED MAY 22, 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7100 **September Term, 1995**
USDC CV 91-2397

Bennie Ferguson, Mary Ferguson,

Appellees,

v.

F. R. Winkler GMBH & Co. KG,

Appellant

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of Appellees' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

Appendix A

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7100 **September Term, 1995**
USDC CV 91-2397

Bennie Ferguson, Mary Ferguson,

Appellees,

v.

F. R. Winkler GMBH & Co. KG,

Appellant

BEFORE: Williams, Ginsburg and Sentelle,
Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed May 3, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED APRIL 5, 1996

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 18, 1996 Decided April 5, 1996

No. 95-7100

BENNIE FERGUSON AND MARY FERGUSON,

Appellees

v.

F.R. WINKLER GMBH & CO. KG,

Appellant

Appeal from the United States District Court
for the District of Columbia
(No. 91cv02397)

Ronald G. DeWald argued the cause for appellant, with whom *Leonard L. Lipshultz* was on the briefs.

James M. Hanny argued the cause for appellees, with whom *Michelle A. Parfitt* was on the brief.

Before: Williams, Ginsburg and Sentelle, *Circuit Judges.*

Sentelle, *Circuit Judge*: In this products-liability action, plaintiff Bennie Ferguson claimed that defendant F.R. Winkler

Appendix B

GMBH & Co. KG ("Winkler") was strictly liable for an injury allegedly caused by a design defect in bakery equipment that Winkler manufactured. Winkler moved for judgment as a matter of law both at the close of the evidence and after the jury's verdict against Winkler. The district court denied these motions as well as a motion for a new trial. Winkler now asks us to reverse any of these denials. Because the evidence presented does not adequately demonstrate that the equipment was unreasonably dangerous when it left Winkler's control, we do reverse the district court's denial of Winkler's motion for judgment as a matter of law and direct the district court to enter judgment for Winkler.

BACKGROUND

Appellant Winkler designs and manufactures various equipment for baking production lines. One component of this equipment, and the focus of this litigation, is the string-line proofer, which transports shaped pieces of dough from one step of the production process to another. According to Winkler's design of the proofer, the pieces of dough rest on trays attached to a moving chain, which, along with the gears and gear sprockets that drive the chain, are enclosed within a large metal duct. Removable panels along the duct permit limited access to the internal machinery for maintenance purposes.

Winkler has manufactured proofers with at least two different types of panels. The older proofer design had panels that were bolted onto the duct, and could only be removed and reinstalled through use of tools. Upon learning that maintenance workers did not always bolt these panels back onto the proofer when they were finished working, however, Winkler replaced these bolted panels with panels that could be removed and

reinstalled by hand. On both the older and newer designs, Winkler included the same safety mechanism: an emergency shut-off button that, when pressed, would stop the line. In the proofer's operations manual, Winkler cautioned users to shut down the line prior to reaching inside the proofer to clean it. Winkler also made a practice of placing a similar warning on the machine itself.

Ottenberg Bakery, a mass producer of baked goods, received the newer model of the Winkler proofer, complete with operations manual and warning sign, in 1975. In using the proofer, Ottenberg grew frustrated with the occasional "double"—two dough pieces that were not fully separated on a single tray—and "hanger"—a piece that did not rest entirely on one of the moving trays—that would appear within the proofer. Not only did the presence of doubles and hangers decrease the number of sellable goods, but too many of the latter would periodically clog the line, as dough would accrete to the machinery with which it came in contact. Although workers could stop the line in order to remove the dough before it could jam the proofer, any such delay reduced the productivity of the bakery.

In an attempt to limit the effects of these "dough anomalies," Ottenberg replaced an exterior panel at one end of the proofer with a hinged, plexiglass door. This door permitted workers to reach into the interior of the proofer and salvage hangers or separate doubles, either by hand or by use of a long rod designed for these purposes. Ottenberg did not add any safety mechanism that would automatically stop the line when the door was opened, and workers became accustomed to reaching into the moving proofer because Ottenberg discouraged shutdowns of the line.

Appendix B

Appellee Bennie Ferguson, an employee of Ottenberg since 1971, had worked with the proofer since Ottenberg received it in 1975. On September 25, 1988, he opened the plexiglass door installed by Ottenberg and reached into the proofer to clear some pieces of dough, as he had done many times before. This time, however, his arm became caught in the moving machinery within the proofer. The accident permanently disabled Ferguson's upper arm.

Ferguson sued a number of parties, including Winkler, Winkler International Corporation, Winkler USA, and Bakers Equipment Wholesalers, Inc. He completed trial only with Winkler, whom he claimed was strictly liable for the defective design of the proofer and for failing to warn Ferguson adequately of the dangers of reaching into the moving proofer. After the district court denied various efforts by Winkler to take the verdict away from the jury, the jury awarded Ferguson $679,173 for the design defect and awarded Ferguson's wife $230,000 for her loss of consortium. Winkler then renewed its motions for judgment as a matter of law and for a new trial, but the district court denied each after oral argument.

Winkler now appeals the denial of its motion for judgment as a matter of law, claiming that Ferguson assumed the risk when he reached into the moving proofer, that the proofer, as shipped by Winkler, did not suffer a design defect, that any unreasonable danger resulted from Ottenberg's alterations to the proofer, and that Ferguson did not need additional warning from Winkler as he was fully aware of the danger involved in the moving equipment. Winkler also revives its motion for a new trial, contending that the judge should have given a more specific instruction regarding Ottenberg's modifications of the proofer.

Appendix B

DISCUSSION

We review the denial of a motion for judgment as a matter of law *de novo*. *See McFarlane v. Caterpillar, Inc.*, 974 F.2d 176, 178 (D.C. Cir. 1992). We will reverse the district court only if "reasonable men could not disagree" that the verdict was incorrect. *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 641 (D.C. Cir. 1988) (quoting *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1227 (D.C. Cir. 1984)). Even though we resolve evidentiary disputes in favor of Ferguson whenever reasonable, *see id.*, the evidence on which the verdict relied must have been "more than merely colorable," but "significantly probative if the . . . verdict is to stand." *McFarlane*, 974 F.2d at 179 (quoting *Siegel v. Mazda Motor Corp.*, 878 F.2d 435, 437 (D.C. Cir. 1989)).

To determine whether the evidence presented was sufficiently probative to sustain a verdict arising within our diversity jurisdiction, we look to the law of the locality in which the district court that rendered the judgment sits. *See Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 553 (D.C. Cir. 1993) (noting that we have extended the *Erie* doctrine to the District of Columbia). According to the law of the District of Columbia, a manufacturer cannot be liable for a design defect unless the plaintiff proves that the product that caused the injury was sold in "an unreasonably dangerous condition." *Warner Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1276 (D.C.App. 1995). The evidence, even taken in the light most favorable to Ferguson, demonstrates that Winkler not only limited potential dangers of the proofer through the design of the machine, but also extensively and explicitly warned persons not to misuse the proofer in a manner that might expose them to any remaining risk. Because Ferguson did not adequately demonstrate that the

proofer was unreasonably dangerous when sold, we hold that the district court should have granted Winkler's motion for judgment as a matter of law.

A. Did the proofer have an unreasonably dangerous design defect?

This past year, the D.C. Court of Appeals reviewed its first design-defect claim based on a theory of strict liability in tort. *Id. Warner Fruehauf* adopted a four-step test for determining whether a seller should be strictly liable:

> 1) the seller [must have been] engaged in the business of selling the product that caused the harm;
>
> 2) the product [must have been] sold in a defective condition unreasonably dangerous to the consumer or user;
>
> 3) the product [must have been] one which the seller expected to and did reach the . . . consumer or user without any substantial change from the condition in which it was sold; and
>
> 4) the defect [must have been] a direct and proximate cause of the plaintiff's injuries.

Id. Warner Fruehauf further analyzed what constituted an unreasonably dangerous defect through a form of the commonly used "risk-utility balancing test," which looks to " 'the risks, costs and benefits of the product in question and alternative designs' " and compares " 'the magnitude of the danger from the product [to] the costs of avoiding the danger.' " *Id.* at 1276 (quoting *Hull v. Eaton Corp.*, 825 F.2d 448, 453 (D.C. Cir.

1987)). Implicit in this analysis is that a court should weigh only those risks of a product against which a manufacturer has some duty to guard a worker, including those risks that emerge from the normal use of the product or objectively foreseeable misuse of the product. *See, e.g., Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712, 726 (D.C.App. 1985); *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988) (weighing, under Maryland law, only risks incurred from normal use and "the incidental and attendant consequences that accompany normal use" (quoting *Payne*, 486 A.2d at 726)); *cf. Young v. Up-Right Scaffolds, Inc.*, 637 F.2d 810, 814 (D.C. Cir. 1980) (finding no threshold duty to warn if risk is not reasonably foreseeable).

Ferguson's evidence as to whether the proofer was unreasonably dangerous focused entirely on the alleged risks that the proofer posed to individuals who reached inside it while it was running. In order to prevail against Winkler, then, it was not enough that Ferguson established a risk of injury from reaching inside the moving proofer; he must also have shown a reasonably foreseeable likelihood that workers would reach inside the moving proofer either during normal operations or as part of some misuse that was reasonably foreseeable at the time the proofer left Winkler's control. *See McNeal*, 836 F.2d at 646; *Young*, 637 F.2d at 815.

1. Was there an unreasonable risk of injury from reaching into the moving proofer as designed and sold by Winkler?

Although there is some reason to think that any risk of injury from reaching into the proofer was slight, Ferguson advanced substantial evidence that a chain guard or an automatic safety interlock may indeed have further reduced the risk of injury to persons who reach inside the operating proofer. For purposes of

our inquiry, then, we will assume that the lack of either in Winkler's design somewhat increased the risk of injury to persons reaching inside the moving proofer as compared to possible alternate designs.

2. Was there an unreasonable risk that workers, during normal operations, would reach inside the moving proofer as designed and sold by Winkler?

Ferguson has not shown significantly probative evidence that the design of the proofer contemplated workers reaching into the moving machinery as part of its normal operations. The proofer merely transported dough from one stage of production to another—a process that was completely mechanized. Neither the old nor new design of the proofer offered any means of unimpeded access to the moving line. Even the presence of doubles or hangers would not demand working with the dough in the moving proofer, as neither posed an immediate threat to the continued operation of the machine.

In addition, Winkler repeatedly warned individuals not to reach into the moving proofer at any time. The proofer, as originally installed by Winkler, displayed a large warning sign that read, in part, "Warning: Before cleaning or servicing or *removing protective . . . covers,* disconnect electric power to machine. . . ." (Emphasis added.) Although paint had hidden this warning by the day of the accident, there is no dispute that a Winkler employee placed such a warning on the proofer when installing the proofer at Ottenberg. A warning with a similar focus was included in the Operations Manual for the proofer that Winkler provided Ottenberg. These extensive warnings from Winkler that explicitly counseled workers against reaching into the moving proofer at any time confirm that Winkler did not

intend workers to reach into the moving proofer as part of its normal operations.

> *3. Was there an unreasonable risk that a worker would reach inside the moving proofer as part of some misuse that could have been reasonably foreseen by Winkler when it designed and sold the proofer?*

Ferguson also has not shown significantly probative evidence that Winkler should have reasonably foreseen either that workers would routinely remove a panel to manipulate the dough without stopping the line or that some employer, like Ottenberg, would permanently remove a panel in order to encourage workers to reach into the proofer. While evidence at trial did indicate that at least two bakeries have now replaced one of the panels on the proofer with a plexiglass door, Winkler had no cause to expect a bakery might adopt such a dangerous modification of the proofer at the time it delivered this proofer to Ottenberg. Certainly, in fashioning the more easily removable panels for the proofer, Winkler did not know of any line worker or bakery that had removed the exterior panels in order to allow access to the moving line; it was only aware of maintenance workers who occasionally neglected to re-install the protective panels. The new panels, which allowed line workers to re-install the panels without the need for tools, thus addressed the sole problem that seemed to arise from the old design. In addition, the evidence strongly suggests that a reasonable observer would not have expected knowledgeable workers to misuse the proofer and risk injury by removing an exterior panel and then reaching inside the moving proofer. That Ottenberg altered the proofer by replacing a panel with a hinged plexiglass door in order to encourage workers to reach into the proofer confirms that there was little risk of workers routinely reaching into the moving proofer as Winkler had designed it.

Appendix B

Even assuming that the original design of the proofer did not sufficiently deter improper and dangerous conduct, Ferguson still has not shown that the proofer was unreasonably dangerous. Although the D.C. courts have never explicitly announced that adequate warnings may cure a design defect, *see Warner Fruehauf Trailer Co.*, 654 A.2d at 1278 & n.16, they have declared that a manufacturer " 'is entitled to defend a strict liability claim based on defective design by showing that a warning accompanied the product that reduced its dangers.' " *Id.* at 1278 (quoting *Carter v. Johns-Manville*, 557 F.Supp. 1317, 1320 (E.D.Tex. 1983)). Much relevant precedent confirms that the presence of warnings may transform an otherwise unreasonably dangerous design, even as compared to other designs, into a safe one. For example, the Maryland courts, which have often served as an aid in interpreting the products-liability law of the District of Columbia, *see Hull*, 825 F.2d at 453-54, have noted that adequate warnings may save a designer from strict liability for alleged design defects. *See Simpson v. Standard Container Co.*, 527 A.2d 1337, 1341 (Md.App.), *cert. denied*, 533 A.2d 1308 (1987). Similarly, we have noted that the "presence of warnings can cure [even an] unreasonable danger." *See Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1306 (D.C. Cir. 1982). A comment to Section 402A of the Restatement (Second) of Torts, from which the District of Columbia derived its version of strict liability for design defects, *see Warner Fruehauf Trailer Co.*, 654 A.2d at 1274, also specifies that "[w]here warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Restatement (Second) of Torts § 402A cmt. j (1965).

In this case, Winkler's obvious and repeated warnings would have, if heeded, eliminated the risk of the injury that Ferguson suffered. As noted, the proofer, as installed, posed no risk unless some person reached inside the machine while it was operating. In its operations manual, Winkler informed users to work with the internal machinery only when the proofer was not running and could not be accidentally activated. Winkler could rely on Ottenberg to pass this information on to its workers, *see Cotton v. Buckeye Gas Products Co.*, 840 F.2d 935, 939 (D.C. Cir. 1988), which Ottenberg did. *See* Ottenberg's Bakery, Inc., *Company Rules and Regulations* 9 (1987) (admonishing employees to "not reach into equipment that is in motion"). As a final precaution, Winkler, when it installed the proofer at Ottenberg, even put a large sign on the machine itself that warned any individual to not even open the machine while the proofer was running. Although this warning was subsequently obscured, the critical issue in a products-liability case in the District of Columbia is whether the warnings made the product safe at the time it left the manufacturer's control. *See, e.g., Warner Fruehauf Trailer Co.*, 654 A.2d at 1274, 1276 (holding that the dangerousness of the risks should be assessed at the time the product was sold). As the warning on the proofer was in place at that time, Winkler "ha[s] a right to rely on [this] warning," as well as its other warnings, "to insulate it from becoming a virtual insurer against all injuries arising from its product." *Higgins*, 863 F.2d at 1168. Because Winkler repeatedly warned workers not to expose themselves to the only risk involved in using the proofer, no reasonable juror could find either that knowledgeable workers might reach into the moving proofer or that the proofer, as designed and sold by Winkler, was unreasonably dangerous. *See id.* at 1167-68; *cf. McNeal*, 836 F.2d at 646 (D.C. Cir. 1988) (finding that lack of warnings or instructions as to safe use made misuse reasonably foreseeable and the manufacturer liable).

Appendix B

B. Other Grounds

Because the design of the proofer was not unreasonably dangerous, we do not need to comment on how the alterations made by Ottenberg affected Winkler's liability. Nor do we need to comment on whether Ferguson assumed the risk when he placed his hand within the moving proofer or whether the district court erred when it did not instruct the jury as to Ottenberg's modifications as Winkler had requested.

We need comment on the "failure to warn" claim only to reject it. A manufacturer suffers liability for a failure to warn in the District of Columbia only if its warning about a product is not adequate to inform the intended user, who demonstrates the level of sophistication common for such users, of particular circumstances or conduct that will likely result in injury from the product. *See Payne,* 486 A.2d at 723. No reasonable party could disagree that Ferguson, who had worked for Ottenberg's since 1971 and had worked with the proofer since it had been installed, knew of the danger in reaching into the moving proofer "by virtue of his profession and experience." *East Penn Mfg. Co. v. Pineda,* 578 A.2d 1113, 1120 (D.C.App. 1990). Even assuming that there was "a risk of harm reasonably foreseeable to the product supplier giv[ing] rise to a duty to warn," *see id.* at 1119, the extensive warnings offered by Winkler ensure that Winkler satisfied any duty to warn it may have had. Thus, we must reverse the district court on this ground as well.

CONCLUSION

Although the D.C. Court of Appeals has recognized that a "finding of unreasonable danger most often turns on the absence of a safety device that was available at the time of manufacture,"

the lack of a safety mechanism, even ones available at the time of design, does not suffice to establish liability. *Westinghouse Elec. Corp. v. Nutt*, 407 A.2d 606, 611 (D.C.App. 1979). "It is one thing to show that the [manufacturer] might have designed a safer product; quite another to show that the product [it] did design was unreasonably dangerous." *Id.* (quoting *Weakley v. Fishbach & Moore, Inc.*, 515 F.2d 1260, 1267 (5th Cir. 1975)). Ferguson did not make the critical latter showing.

Although a judgment as a matter of law is not common, one is far more likely to issue in favor of parties who do not bear the ultimate burden of proof on an essential issue. *Cf. Warner Fruehauf*, 654 A.2d at 1279 (noting that directed verdicts are granted only "sparingly" in favor of the party with the burden of proof). Because Ferguson did not adequately demonstrate either that the proofer was unreasonably dangerous when it left Winkler's control or that Winkler failed to warn an experienced user adequately, he cannot prevail as a matter of law. We must reverse the district court's ruling to the contrary.

It is so ordered.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED MARCH 7, 1995

Civil Action No. 91-2397

BENNIE FERGUSON, *et al.*,

Plaintiffs,

v.

WINKLER INTERNATIONAL CORP.,

Defendant.

ORDER

Before the Court is defendant's Post Trial Motion for Judgment as a Matter of Law, or in the Alternative, Motion for a New Trial. Upon consideration of said motion, plaintiffs' opposition thereto, and the arguments of counsel made at the March 3, 1995 motions hearing, it is, this 7th day of March, 1995 hereby

ORDERED that defendant's motion is denied; and it is

ORDERED that the jury verdict returned on July 26, 1994, in this matter be affirmed.

s/ John H. Pratt
JOHN H. PRATT
United States District Judge

Supreme Court, U.S.
FILED
SEP 20 1996
CLERK

(2)

No. 96-289

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BENNIE FERGUSON, *et al.*,
Petitioners,

v.

F.R. WINKLER GMBH & CO. KG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT F.R. WINKLER GMBH & CO. KG TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is the issue of whether the Court of Appeals for the D.C. Circuit applied District of Columbia precedent regarding strict liability for a design defect an issue worthy of certiorari where it involves asserted errors of factual findings and misapplication of properly stated rules of the common law of the District of Columbia.

2. Is the issue of whether the Court of Appeals for the D.C. Circuit used the wrong standard of review in reversing the district court's denial of respondent's motion for judgment as a matter of law an issue worthy of certiorari where it involves assertions of erroneous factual findings and a misapplication of a properly stated rule of law.

PARTIES TO THE PROCEEDINGS

The original parties to the case, in addition to those identified by the petitioners, were Winkler International Corporation and Bakers Equipment Wholesalers, Inc. Both were dismissed by petitioners before trial by praecipe filed on November 4, 1993.

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COUNTERSTATEMENT OF THE CASE

Petitioners make several misstatements of fact in their petition that require correction. While these misstatements are not critical to the disposition of the petition, Sup. Ct. R.

15.2 requires that respondent address them in order to forestall the possibility of a waiver of objections.

Ottenberg did not purchase the Winkler String Line Proofer from Winkler U.S.A., LP. Petition at 2. That firm did not exist in 1975. It was distributed by a predecessor to one of the dismissed defendants.

Mr. Jehle, the respondent's employee on site at the installation, placed a warning sign on the infeed end of the proofer himself and provided additional warning signs for subsequent installation on the proofer.

Respondent originally designed the proofer with hooks as the means of attachment for the steel access panels. It changed the design to bolted on panels and subsequently changed back to the hook system. Respondent did not design the subject proofer's discharge end panel with hooks because "operators" of previous proofers equipped with bolted on panels removed the panels and left them off. *Id.* at 2-3. The hooked panels were used because in the intermediate design, maintenance workers routinely removed the bolted panels and left them off during cleaning of the proofer because of the relative lack of ease of bolting and unbolting these panels for routine maintenance.

Petitioners state that Bernard Jehle, Winkler's representative charged with overseeing the installation of the subject proofer in the Ottenberg bakery, testified that there was a persistent problem of hangers and doubles when he left Ottenberg. *Id.* at 3-4. He did not testify that such problems were common or persistent, only that an occasional dough

anomaly will occur with any proofer. This was corroborated by the testimony of a representative of another bakery. That bakery did not experience the dough problems present in the Ottenberg proofer. The evidence at trial showed that Ottenberg's problems were created by alterations that the bakery made to the proofer which affected the timing of the components of the line and which served, among other things, to increase the speed of the proofer beyond design parameters.

Petitioners refer to Ottenberg's replacement of the original solid metal panel at the discharge end of the proofer with a hinged plexiglass door. *Id.* at 4. However, petitioners omit that the hinged plexiglass door at that location was a unique innovation placed there by Ottenberg in an attempt to make it easier for the operators of the proofer to reach into the proofer to clear the inordinate amount of dough anomalies created by Ottenberg itself.

Petitioners state that Mr. Ferguson reached up and away from the shaft and sprockets and his arm was suddenly grabbed by an unguarded chain and dragged into an exposed socket. *Id.* This statement is without any support in the record. It was first made by petitioners in their brief. There simply is no evidence that Ferguson's arm was dragged by a chain into a sprocket. Ferguson testified that he did not know how his arm reached the shaft and sprocket.

REASONS FOR DENYING WRIT

I.

WHETHER THE COURT OF APPEALS FOR THE D.C. CIRCUIT APPLIED DISTRICT OF COLUMBIA PRECEDENT REGARDING STRICT LIABILITY FOR A DESIGN DEFECT IS NOT AN ISSUE WORTHY OF CERTIORARI BECAUSE IT INVOLVES ASSERTED ERRORS OF FACTUAL FINDINGS AND MISAPPLICATION OF PROPERLY STATED RULES OF THE COMMON LAW OF THE DISTRICT OF COLUMBIA.

This is a product liability case decided under state law.[1] The D.C. Circuit's opinion does not conflict with the decision of another circuit; it does not decide an important federal question that conflicts with a decision of a state court of last resort; the D.C. Circuit has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure of a lower court. However, the petition does, in effect, assert that the D.C. Circuit made erroneous factual findings and misapplied properly stated rules of law.[2]

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[1] As petitioners correctly point out in their petition, decisions of the District of Columbia courts are treated as decisions of state courts for purposes of interpreting state law. *Pernell v. Southhall Realty*, 416 U.S. 363, 368 (1974).

[2] The Court has long held that it "will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited [to the District of Columbia] or declare the common law of the District." *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935) *Del Vecchio*, unlike the instant case, involved a law that was national in scope, the Longshoremen's

Respondent respectfully submits that these are not worthy bases for certiorari. Respondent further suggests that the D.C. Circuit, in any event, did not make erroneous factual findings and did not misapply the law.

Petitioners argue that the D.C. Circuit violated the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) by failing to follow pertinent D.C. precedent. They specifically argue that the court misapplied *Warner Fruehauf v. Boston*, 654 A.2d 1272 (D.C. 1995)[3], and its risk-utility test for evaluating strict liability design defect cases. The D.C. Circuit, they contend, set out on a course of its own by establishing a failure to warn as the sole consideration in determining whether the subject proofer was defectively designed. Even if petitioners were correct, this is not an issue worthy of a grant of certiorari.

The Court eliminated former Sup. Ct. R. 19(b) (1970) in 1980. That rule provided that a federal court of appeals' decision of an important state question was a basis for certiorari if it conflicted with applicable state law. Recently, the dissent in *Leavitt v. Jane L.*, 116 S.Ct. 2068 (1996) noted that this deletion "was intended to communicate our view that errors in the application of state law are not a sound reason for granting certiorari, except in the most extraordinary cases." *Id.* at 2073-2074. The per curiam opinion did grant certiorari on a question of state law, but in so doing acknowledged that the case was extraordinary and the substantive issue was

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and Harbor Workers' Compensation Act. The instant case simply involves application of the District of Columbia common law to the specific facts of this case and has no national scope or implications.

[3] Also found in Petition Appendix at 4a-16a (hereafter "Pet. App. at __").

controversial, thereby limiting such grants, notwithstanding the deletion of former Rule 19(b), to rare cases:

> The fact observed by the dissent, that the "underlying substantive issue in this case" is a controversial one, generating "a kind of 'hydraulic pressure' that motivates ad hoc decision-making," post, at 2073, provides a greater, not a lesser, justification for reversing state-law determinations that seem plainly wrong. In our view, these considerations combine to make this an "extraordinary cas[e]" worth our effort of summary review, post, at 2073.

Id. at 2072.[4]

The substantive underlying issue in *Leavitt* involved state regulation of abortion. The substantive underlying issue in the instant product liability case involves no such controversial issue and is not, in any respect, an extraordinary case.

The dissent, in *Leavitt*, also pointed out that almost fifty years had passed since the last grant of certiorari in a case involving a federal appellate court's interpretation of state law. It also noted the Court had not granted certiorari in such a case

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[4] The per curiam opinion also relied on its finding that the court of appeals was "plainly wrong" in interpreting the involved state law. *Id.* at 2073. The Court found that this amounted to "blatant federal-court nullification of state law." *Id.* at 2072. This is not true in the instant case, as will be discussed below. To the contrary, the D.C. Circuit was correct both in interpreting as well as applying the relevant D.C. law.

in the sixteen years since the elimination of former Rule 19(b)(1). *Id.* at 2074.

The per curiam and the dissent agreed that there has been a presumption that circuit courts correctly decide questions of state law. The per curiam opinion based this presumption on the questionable utility of the Supreme Court reviewing such decisions. The dissent attributed this deference, in part, to its conclusion that the courts of appeals had greater familiarity with the laws of states within their circuits and was better qualified to interpret them.

Whatever the basis, both views agreed that the review of questions of state law decided by lower federal courts should be rare and made only in extraordinary cases with national significance.

Respondent respectfully suggests that granting certiorari on this issue could have the deleterious effect of encouraging petitions for certiorari in federal diversity cases that do not involve issues of national significance. Save in the rare case, misapplication of state law has not been a sound basis for certiorari.

Even if the question of state law was for review, petitioners are incorrect in declaring that the D.C. Circuit failed to properly apply the relevant District of Columbia law. The D.C. Circuit, cited, quoted, and applied the District of Columbia Court of Appeals' latest expression of the law of strict liability for a design defect, *Warner Fruehauf*. Petitioners stated that the D.C. Circuit extracted one aspect of the risk-utility test, the adequacy of warnings, and raised it to

the level of sole consideration of the defendant's conduct in designing its product. However, the D.C. Circuit never did that. In its opinion, the court, after acknowledging that the D.C. Court of Appeals reviewed its first strict liability design defect case, said the following with respect to the D.C. court's holding:

> *Warner Fruehauf* further analyzed what constituted an unreasonably dangerous defect through a form of the commonly used "risk-utility balancing test," which looks to "'risks, costs and benefits of the product in question and alternative designs'" and compares "'the magnitude of the danger from the product [to] the costs of avoiding the danger.'" . . . . Implicit in this analysis is that a court should weigh only those risks of a product against which a manufacturer has some duty to guard a worker, including those risks that emerge from the normal use of the product or objectively foreseeable misuse of the product. . . .

Pet. App. at 9a-10a (citations omitted).

The D.C. Circuit determined that there was insufficient probative evidence presented by the petitioners to establish that the design was unreasonably dangerous during normal operations (Pet. App. at 11a), or during reasonably foreseeable misuse (Pet. App. at 12a). The court went so far as to assume that the design alternatives proffered by petitioners would have somewhat reduced the risk of injury. Pet. App. at 10a-11a. In the course of making these determinations, the court did review the adequacy of warnings placed on the proofer and in printed

materials. However, this was not the sole consideration. *See* Pet. App. at 11a-12a.

Nor did the D.C. Circuit predict that the D.C. Court of Appeals would make this the sole consideration. Instead, the court cited *Warner Fruehauf* for the proposition that a manufacturer may defend a strict liability design case by showing that there was a warning that reduced the product's dangers. A full quotation of the D.C. Court of Appeals' statement reveals the D.C. Circuit's intent:

> Under a risk-utility analysis, "[a] manufacturer [or distributor] is entitled to defend a strict liability claim based on defective design by showing that a warning accompanied the product that reduced its dangers." *Carter v. Johns-Manville*, *supra*, 557 F.Supp. at 1320. However, while the adequacy of a warning is relevant and may even tip the balance in the decision whether a product is or is not defectively designed, it is not the sole consideration: "A warning is only one of a product's many design attributes that weigh in the balance of dangers against utility ... but could be a pivotal design attribute in a particular case." *Id.* (emphasis added).

Warner Fruehauf, 654 A.2d at 1278.

The D.C. Circuit clearly held that the warnings that accompanied the subject proofer, while being only one of its many design attributes, would be pivotal in this particular case only after assuming that the design of the proofer did not deter dangerous conduct. Pet App. at 13a-15a. The federal appellate

court simply applied D.C. common law in the course of its appropriate *de novo* review of the evidence to determine whether the petitioners proffered sufficiently probative evidence to support the verdict. The D.C. Circuit's analysis of the warning issue was based on the hypothetical assumption that the proofer presented a reasonably foreseeable risk of harm, a risk that the court actually found did not exist. Pet. App. 11a-15a.

As for the question of the D.C. Circuit's review of the adequacy of the warnings, petitioners assail that court for determining that the warnings were adequate as a matter of law. Petitioners cite *Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712 (D.C. 1985) for the proposition that the adequacy of a warning should not be decided as a matter of law. Petition at 14. Overlooked by petitioners is the fact that the court in *Warner Fruehauf* decided the question as a matter of law. Clearly, the D.C. Court of Appeals recognizes exceptions to its general rule. Thus, as a general proposition, the D.C. Circuit did not incorrectly interpret D.C. law on this point.

Petitioners' certiorari request is actually based on allegations of factual error. Petitioners would have this Court engage in a *de novo* review of facts to determine whether they, and any inference therefrom, support the notion that the warnings were inadequate. To aid this task, petitioners would have the Court compare the facts in the instant case with the facts in *Warner Fruehauf* to determine the adequacy of the warnings. That is precisely what petitioners did in their petition. They concluded that "[l]ike the defendant in *Warner Fruehauf*, Winkler's warnings were insufficient as a matter of law in the District of Columbia because they failed to warn the

user of the specific defect in the proofer." Petition at 16. Because the D.C. Circuit did not agree with their conclusion, petitioners argue, in essence, that the court made erroneous findings of fact and misapplied District of Columbia law. Thus, they petition the Court to redress those claimed errors. Such questions, while of great significance to the litigants here, have no significance beyond the confines of this case and should not support a grant of certiorari. *See* Sup. Ct. R. 10.

II.

WHETHER THE COURT OF APPEALS FOR THE D.C. CIRCUIT USED THE WRONG STANDARD OF REVIEW IN REVERSING THE DISTRICT COURT'S DENIAL OF RESPONDENT'S MOTION FOR JUDGMENT AS A MATTER OF LAW IS NOT AN ISSUE WORTHY OF CERTIORARI BECAUSE IT INVOLVES ASSERTIONS OF ERRONEOUS FACTUAL FINDINGS AND A MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

The D.C. Circuit looked, primarily, to *McFarlane v. Caterpillar, Inc.*, 974 F.2d 176, 178 (D.C. Cir. 1992) for the standard of review to be employed in reviewing the denial of respondent's motion for judgment as a matter of law:

> We review the denial of a motion for judgment as a matter of law *de novo*. . . . We will reverse the district court only if "reasonable men could not disagree" that the verdict was incorrect. . . . Even though we resolve evidentiary disputes in favor of Ferguson whenever reasonable, . . . the evidence on which the verdict relied must have been "more than merely colorable," but

> "significantly probative if the . . . verdict is to stand." . . . .

Pet. App. at 8a (citations omitted).

Petitioners do not criticize this statement of law. Instead, they conclude that the "D.C. Circuit merely paid lip service to the well established principles" found in prior D.C. Circuit decisions. Petition at 19. The essence of their argument is that "[t]he opinion of the D.C. Circuit is replete with errors of fact which there can be no doubt are the result of applying the wrong standard to its inquiry." Petition at 20. Petitioners make it clear that this "wrong standard" is the D.C. Circuit's failure "to view the evidence in a light most favorable to Mr. Ferguson, [failure] to draw reasonable inferences in his favor, and [failure] to resolve all factual disputes in his favor." *Id.* To reinforce their argument, petitioners cite examples of the court's "errant rendition of material facts". *Id.* Respondent disputes this contention, for it is petitioners who hold the erroneous view of the facts. Nevertheless, petitioners quarrel with the D.C. Circuit's *de novo* review of the evidence and the inferences that it made from the evidence, not the standard of review that it used in execution of that task. In so doing, they are asking this Court to make an independent *de novo* review of the record in the hope that a second appellate review will lead to a different outcome. As in part I. above, this is a question that lacks the earmarks of a certiorari worthy case. Again, petitioners allege errors of fact and misapplications of law, not compelling questions of national significance.

CONCLUSION

In an attempt to make this case into something that it is not, petitioners invoke *Erie v. Tompkins*, notions of federalism and the specter of federal common law. The instant case is not

one where the federal appellate court ignored District of Columbia common law or applied an erroneous standard for the review of denials of motions for judgment. This case has nothing to do with uniformity of decisions between state and federal courts on issues of state law, and will not influence forum shopping. This case is one where an appellate court made an appropriate *de novo* review of the evidence and disagreed with the district court's denial of a motion for judgment. The court of appeals applied District of Columbia law in this diversity case and came to a conclusion contrary to that of the district court and petitioners. Certiorari is not warranted.

Respectfully submitted,

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